

EV 07-0024-CR 8 Y/H USA v Simmons
Judge Richard L. Young

Signed on 07/28/08

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

USA,)	
)	
Plaintiff,	)	NO. 3:07-cr-00024-RLY-WGH-8
)	
TANISHA WEST,)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

UNITED STATES OF AMERICA,)	
Plaintiff,)	
)	
vs.	)	3:07-cr-24-RLY-WGH
)	
JEREMY SIMMONS, a/k/a Chicago Mike,	)	-01
BRIAN JONES, a/k/a Big B,	)	-03
LEONARD HOSKINS, a/k/a Pooh,	)	-04
SAM COOK,	)	-05
LAMONT ROBINSON,	)	-06
MITCHELL MCGHEE,	)	-07
TANISHA WEST, and	)	-08
DAMAND MATTHEWS, a/k/a Munchie,	)	-09
Defendants.)	

**ENTRY ON DEFENDANTS' MOTION TO SUPPRESS EVIDENCE OBTAINED BY
WIRETAP**

On July 1, 2008, Defendant, Jeremy Simmons ("Defendant Simmons"), filed the instant motion to suppress evidence obtained by wiretap. At the pretrial conference held on June 9, 2008, the Defendants moved to join in the instant motion, and the court granted the request. Accordingly, the court's ruling applies to all of the named Defendants listed in the above caption, and this motion is hereinafter styled as "Defendants' motion." For the reasons set forth below, Defendants' motion is **DENIED**.

I. Background

Defendants in this case are charged as members in a conspiracy to distribute cocaine and cocaine base in the Evansville, Indiana, and surrounding areas. During the investigation of the charged conspiracy, the Government filed an application for wire surveillance, seeking to monitor the cellular telephone ("cell phone") used by Defendant Simmons (identified in the

application for wire surveillance and affidavit as “Target Phone II”) and the cell phone used by David Neighbors (“Neighbors”) (identified in the application for wire surveillance and affidavit as “Target Phone I”), a defendant in another charged conspiracy in this court with alleged ties to the conspiracy charged in the present case. At the time the Government filed its application for wiretap surveillance, the two alleged conspiracies were indicted as one conspiracy in a single indictment. Since that time, the two alleged conspiracies have been indicted separately. The court ultimately granted the Government’s request for wire surveillance on the cell phones of both Defendant Simmons and Neighbors.

The trial against the Defendants in this case is scheduled to begin October 6, 2008. At trial, the Government will purportedly use evidence obtained through the wiretap surveillance against Defendants. Defendants now seek to exclude that wiretap evidence.

II. Hearing on the Motion to Suppress

As an initial matter, the court must address Defendants’ request for a hearing on the present motion. The court need only have a hearing on a motion to suppress if the party requesting that hearing demonstrates a significant factual dispute. *See United States v. Sophie*, 900 F.2d 1064, 1071 (7th Cir. 1990). Defendants request a hearing on the present motion but point to no factual dispute in the record that would require a hearing. Therefore, the court finds that a hearing on this matter is not appropriate. Defendants’ request is denied.

III. Discussion of Motion to Suppress

Defendants seek to suppress the wiretap evidence because probable cause did not exist to approve the application for wiretap surveillance and, alternatively, because the Government did not establish the necessity for wiretap surveillance. While Defendants vigorously argue they have standing, the Government does not dispute that point, and the court will likewise not

address it. The court addresses the probable cause and necessity arguments below.

A. Probable Cause

In order for the court to approve a wiretap application, 18 U.S.C. § 2518(3) requires, in addition to the necessity requirement discussed in Section B, *infra*, that probable cause exists to believe (1) an individual is about to commit, is committing, or has committed a particular offense; (2) particular communications concerning that offense will be obtained through such interception; and (3) the facilities from which the wire communication is to be intercepted is being used in connection with the commission of the offense. 18 U.S.C. § 2518(3)(a), (b), (d). In *United States v. Dumes*, the Seventh Circuit held that probable cause for wire surveillance existed where a confidential informant made controlled purchases of cocaine from the target of the investigation and the target used the cell phone disclosed in the affidavit for wiretap application to arrange those purchases. 313 F.3d 372, 379–80 (7th Cir. 2002).

Defendants argue that probable cause did not exist to issue the wiretap for Defendant Simmons' cell phone, Target Phone II, because the Government relied only on the probable cause showing with respect to Neighbors' phone to support its wiretap application for Defendant Simmons' phone. The court disagrees. The affidavit filed with the application for wire surveillance indicates that the DEA executed controlled purchases of crack cocaine from Defendant Simmons on two occasions, March 13, 2007, and March 16, 2007. (Affidavit of DEA Special Agent Douglas Freyberger ("Freyberger Aff.") ¶¶ 41–52). On both of these occasions, an informant placed a telephone call to Defendant Simmons' cell phone – using Target Phone II's telephone number identified in the application for wire surveillance and the affidavit in support as (812) 589-3732 – to arrange the purchase of crack cocaine from Defendant Simmons. (*Id.* ¶¶ 41, 48). The facts in this case are nearly identical to those in *United States v. Dumes*,

discussed above, and thus, the court finds that probable cause existed to approve the application for wire surveillance on Defendant Simmons' cell phone, otherwise known as Target Phone II.

Defendants also argue that probable cause was lacking because the wiretap application was "impermissibly tainted" with information about the other conspiracy, which was ultimately indicted separately. (Defs.' Memo. in Support 6). However, the Defendants do not cite any legal authority in support of this argument, nor do they allege how this information tainted the wiretap application. At the point in time in which the wiretap application was filed, the conspiracies were charged in one indictment and the information contained in the application was relevant to the two targets of the proposed wiretap. The fact that the second target of the wiretap, Neighbors, was ultimately charged in a separate indictment does not affect the application for the wiretap on Defendant Simmons' phone, considering that an independent basis for approving that wiretap existed.

B. Necessity

Defendants next challenge the necessity of the wiretap on Defendant Simmons' phone. An application for wire surveillance must contain "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(1)(c). The Government may establish its need for wire surveillance by establishing any one of the three alternatives listed in 18 U.S.C. § 2518(1)(c). *United States v. Zambrana*, 841 F.2d 1320, 1329 (7th Cir. 1988). "[T]he government's burden of establishing its compliance with subsection 2518(1)(c) is not great" and should "be reviewed in a practical and commonsense fashion." *United States v. Ceballos*, 302 F.3d 679, 683 (7th Cir. 2002) (quoting *Zambrana*, 841 F.2d at 1329).

Defendants argue that the wiretap was not necessary because the Government uncovered some information relating to the charged conspiracy through traditional investigative techniques, and therefore, such techniques were sufficient to obtain further information regarding the alleged criminal activity. However, the affidavit in support of the wiretap application demonstrates that the investigative techniques used would be insufficient and/or unlikely to succeed to accomplish the ultimate identification and prosecution of the alleged conspiracy.

First, the use of informants – Samuel Curry (“Curry”), Individual #1, Individual #2, and Individual #3 – while successful in providing some initial information about the alleged conspiracy, was unlikely to advance the investigation. For example, neither Curry nor Individual #2 were able to provide any information about Defendant Simmons or his associates. (Freyberger Aff. ¶¶ 24–30). Individual #1, who executed two controlled purchases of crack cocaine from Defendant Simmons, was able to identify only one of Defendant Simmons’ cocaine customers, and was only able to confirm that Defendant Simmons received his cocaine from a Hispanic male and an individual in the Chicago, Illinois area. (*Id.* ¶ 18). Finally, Individual # 3, who was able to identify only one of Defendant Simmons’ cocaine customers and was able to confirm only that Defendant Simmons sold crack cocaine to an individual known as “Reese,” could not identify the source of Defendant Simmons’ cocaine. (*Id.* ¶¶ 31, 80).

Second, the use of undercover officers, which was not attempted, reasonably appeared unlikely to succeed. Defendant Simmons’ alleged drug trafficking organization was insular in nature; thus, the alleged drug traffickers would likely be suspicious of a new individual, particularly in a city the size of Evansville. (*Id.* ¶¶ 83–84). In addition, alleged drug traffickers in the Evansville area have developed intelligence information about the identity of local police officers and have circulated a list of the names and vehicles of local narcotics officers. (*Id.* ¶

83). Such information would clearly impede a successful infiltration by an informant. (*Id.*).

Third, telephone records and pen registers, while initially employed in the investigation, were unlikely to advance it. These investigative tools confirmed only that contact was made between two telephone numbers. (*Id.* ¶ 90). Thus, the pen registers and telephone records did not identify the participants in the conversations or the nature or substance of the conversations. (*Id.*).

Fourth, the use of physical surveillance was not a viable alternative to wire surveillance. The affidavit noted that the relevant area was densely populated with little traffic activity, making it nearly impossible to conceal the officers' surveillance vehicles. (*Id.* ¶ 92). Thus, while officers had been able to conduct limited surveillance with some success, prolonged physical surveillance was not sustainable. (*Id.*). Even if such surveillance were possible, the evidence obtained through such means would not accomplish the goals of the investigation because it could not link the individuals surveilled to the telephone numbers derived from the means noted above. (*Id.* ¶ 93).

Fifth, the use of search warrants would be unlikely to advance the goals of the investigation because the DEA had not identified the locations where a search warrant would be appropriate. (*Id.* ¶ 89(a)). Moreover, executing a search warrant would alert the members of the alleged conspiracy to the ongoing investigation. (*Id.* ¶ 89(f)).

Sixth, issuing grand jury subpoenas would be unlikely to succeed in furthering the goals of the investigation because the targets of the investigation, in all likelihood, would be uncooperative before the grand jury or would invoke their Fifth Amendment right to remain silent. (*Id.* ¶ 88).

Lastly, although the combined use of conventional law enforcement techniques revealed

the identities of alleged cocaine traffickers Stanley Pike, Brian Jones, and Defendant Simmons, such information was not likely to accomplish the goals of the investigation. Indeed, the combined use of conventional techniques did not allow the Government to identify Defendant Simmons' cocaine supplier, nearly all of Defendant Simmons' alleged customers, the stash locations used by members of Defendant Simmons' alleged cocaine trafficking organization, or the manner in which Defendant Simmons allegedly obtained cocaine from his source.

Reviewing the above factual bases in a commonsense and practical light, the court finds that traditional investigative measures either failed and/or would be unlikely to achieve the goals of the investigation. The Government thus satisfies the necessity requirement for approving an application for wire surveillance. *See Ceballos*, 302 F.3d at 683–84 (finding necessity requirement for wiretap met where the government demonstrated that traditional investigative techniques, such as the use of informants, undercover agents, telephone records and pen registers, and physical surveillance, had been and would continue to be insufficient to establish the full extent of the drug conspiracy).

Because the Government established the probable cause and necessity requirements to conduct wire surveillance over Defendant Simmons' cell phone (Target Phone II), Defendants' motion to suppress wiretap evidence is **DENIED**.

IV. Conclusion

For the foregoing reasons, the court **DENIES** Defendants' Motion to Suppress Evidence Obtained by Wiretap (Docket # 188). The court also **DENIES** Defendants' request for a hearing on the motion.

SO ORDERED this 28th day of July 2008.

s/ **Richard L. Young**

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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